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No. 86-1661

In the Supreme Court of the United States

OCTOBER TERM, 1986

BATTLES FARM COMPANY, ET AL., PETITIONERS

v.

SAMUEL R. PIERCE, JR., SECRETARY
OF HOUSING AND URBAN DEVELOPMENT

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

BRIEF FOR THE RESPONDENT IN OPPOSITION

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QUESTION PRESENTED

Whether the Secretary of Housing and Urban Development was "substantially justified" in defending this lawsuit, in light of petitioners' novel claim of entitlement to long-term contracts under the now-defunct operating subsidy program, so that petitioners were not entitled to an award of attorney fees under the Equal Access to Justice Act, 28 U.S.C. 2412(d).

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OPINIONS BELOW

The opinion of the court of appeals (Pet. App. 1a-14a) is reported at 806 F.2d 1098. The opinion of the district court (Pet. App. 15a-35a) is unreported.

JURISDICTION

The judgment of the court of appeals was entered on December 12, 1986. A petition for rehearing was denied on March 3, 1987 (Pet. App. 47a-49a), and the petition for a writ of certiorari was filed on April 16, 1987. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATUTORY PROVISIONS INVOLVED

28 U.S.C. 2412(d) provides in pertinent part:

> (1)(A) Except as otherwise specifically provided by statute, a court shall award to a prevailing party other than the United States fees and other expenses, * * * incurred by that party in any civil action (other than cases sounding in tort) brought by or against the United States in any court having jurisdiction of that action, unless the court finds that the position of the United States was substantially justified or that special circumstances make an award unjust.

STATEMENT

1. The history of this litigation is set forth in the court of appeals opinion (Pet. App. 3a-6a), and in the court's opinion on the merits in *Battles Farm Co.* v. *Pierce*, 703 F.2d 1292, 1293-1294 (D.C. Cir. 1983). Briefly, amendments made to the National Housing Act in 1974 authorized the Secretary to make "operating subsidy" payments[1] to owners of low-income housing projects to help them defray increased expenses (12 U.S.C. (1976 ed.) 1715z-1). The amendments contemplated two means by which the Secretary would make such payments. First, the Secretary was authorized to make subsidy payments from a "rental reserve fund," a fund consisting of excess rental charges remitted by project owners to

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[1] The operating subsidy program was restructured by Congress in 1977 and eliminated the following year. Housing and Community Development Amendments of 1978, Pub. L. No. 95-557, Tit. II, § 201, 92 Stat. 2084 (12 U.S.C. 1715z-1(f)(3) and (g), 1715z-1a).

the Secretary. Second, the Secretary was authorized to enter into long-term contracts committing HUD to pay these subsidies for extended periods of time. 12 U.S.C. (1976 ed.) 1715z-1(f)(3).[2]

2. The instant action was brought in March 1976 by petitioners, project owners who sought to compel the Secretary to make operating subsidy payments. Petitioners made two interrelated claims. They sought subsidies out of the "rental reserve fund" retroactive to February 18, 1975, the date on which the operating subsidy program was to be in place. They also contended, based on the same statutory provision, that the Secretary was obligated to enter into long-term contracts pledging to continue operating subsidy payments for the 40-year life of the housing project.

In June 1976 the district court directed the Secretary to make operating subsidy payments to petitioners from February 18, 1975 forward, out of the rental reserve fund. Pet. App. 3a-4a; see 414 F. Supp. 521. The Secretary appealed from this holding.[3] The court refused, however, to order the Secretary to enter into long-term operating subsidy contracts with petitioners, and it also rejected their contention that they were entitled to retroactive sub-

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[2] Congress has provided the Secretary with "contract authority" for these programs. "Contract authority" is discussed in *Train* v. *City of New York*, 420 U.S. 35, 39 n.2 (1975). Briefly, the release of contract authority by Congress enables the Secretary to enter into commitments for the payment of federal funds up to a stated limit, prior to an appropriation of funds for the liquidation of such commitments.

[3] Since there was no stay, the Secretary commenced making current operating subsidy payments at the rate directed by the district court.

sidies based on the rents they would have charged if the operating subsidy program had been implemented in February 1975, rather than subsidies based on the lower rents petitioners actually charged. Petitioners cross-appealed from these holdings. The district court also denied petitioners' motion for attorneys' fees, relying on *Alyeska Pipeline Co.* v. *Wilderness Society*, 421 U.S. 240 (1975), because no statute at the time authorized such a fee award against the government.

Petitioners' lawsuit was consolidated for argument in the court of appeals with *Underwood* v. *Hills*, Nos. 76-1603 & 76-1650 (D.C. Cir.), a nationwide class action brought by tenants in eligible projects to compel the Secretary to implement the operating subsidy program.[4] After argument, the court of appeals ordered the cases held in abeyance upon this Court's grant of certiorari in *Harris* v. *Abrams*, 431 U.S. 928 (1977), and *Harris* v. *Ross*, 431 U.S. 928 (1977). This Court never decided *Abrams* and *Ross*, however, because the two cases were settled as part of a general settlement of the *Underwood* nationwide class action.[5] On March 22, 1982, this Court vacated

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[4] The district court's nationwide injunction in *Underwood* was stayed by this Court pending appeal. *Hills* v. *Underwood*, 429 U.S. 892 (1976).

[5] Pursuant to the *Underwood* settlement, the money in the rental reserve fund as of September 30, 1977, was set aside for payments to tenants in eligible projects, to compensate the tenants for the increased rents they had to bear in the absence of the operating subsidy program. Tenants who resided in these projects between February 1, 1975 and September 30, 1977 were reimbursed under the *Underwood* settlement. Petitioners' tenants were among those reimbursed pursuant to this settlement; petitioners themselves did not participate in or benefit from the settlement.

the court of appeals' judgment in *Abrams* and *Ross* and remanded the cases to the appropriate district courts for dismissal upon the parties' motion. 455 U.S. 1010.

The instant litigation remained dormant in the D.C. Circuit until February 1982, when the court of appeals requested a status report from the parties. In conjunction with his status report, the Secretary moved for supplemental briefing on the effect of post-1976 developments. On July 7, 1982, the court granted the Secretary's motion.

In their supplemental brief, petitioners maintained that they remained entitled to long-term contracts guaranteeing them operating subsidies for the life of their project mortgages, and that they were also entitled to retroactive subsidies for the period February 1975-May 1976. The Secretary resisted both propositions. He argued that the manner of implementation of the operating subsidy program (*e.g.*, whether by long- or short-term arrangements) had been left to his discretion, and that he had reasonably declined to enter into long-term contracts. The Secretary also argued that the *Underwood* settlement, which had reimbursed petitioners' tenants for their increased rents, had wiped out petitioners' claim of additional entitlement to retroactive subsidies. The Secretary thus took the position that petitioners had received everything to which they were entitled under the operating subsidy program. The Secretary did not press the argument—central to the pre-1982 phase of the litigation—that he had discretion not to implement this long-repealed program at all.

The court of appeals agreed with the Secretary's view of the long-term contract issue, pointing out that "[petitioners'] argument on this issue is weak" (703 F.2d at 1296). The court held, however, that

petitioners might be entitled to an award of retroactive subsidies based on the difference between the rents they actually charged and the rents they would have charged if the Secretary had implemented the program in February 1975 (703 F.2d at 1294-1297). The court remanded the case to the district court for a determination of the latter issue, which the parties then settled.

3. On April 21, 1983, petitioners moved for summary reversal of the district court's 1976 denial of attorneys' fees, claiming entitlement to fees under the Equal Access to Justice Act (EAJA), 28 U.S.C. 2412, which became effective October 1, 1981. The Secretary opposed this motion and cross-moved for summary affirmance of the district court's denial of fees. The court of appeals vacated the district court's original holding on fees and remanded the case to the district court to determine whether petitioners could obtain an award of fees under EAJA. Pet. App. 5a n.6.

On remand, the district court held that the Secretary's position in the litigation was not "substantially justified," and that petitioners were therefore entitled to an award of attorneys' fees and paralegal expenses under EAJA. Pet. App. 15a-44a. The court relied chiefly upon the Secretary's decision to settle the *Underwood* litigation, and the Secretary's changed posture in the post-1981 phase of the litigation, to support its conclusion that the government's position was not "substantially justified." Pet. App. 22a-25a.

The court of appeals unanimously reversed (Pet. App. 1a-14a). With respect to the pre-1982 phase of this litigation, the panel held that petitioners' two claims—that implementation of the operating subsidy program was mandatory, and that petitioners were

entitled to long-term operating subsidy contracts—"were interrelated," so that the government could not have conceded the former issue without undermining its position on the latter. Pet. App. 8a-12a. The court noted that petitioners' two claims "turned in large part on the interpretation of the same statutory language" (*id.* at 9a), and that petitioner's long-term contract claim, which the government successfully resisted, "was far more costly and would have committed [HUD] to carry out the operating subsidy program for *four decades*, an awesome precedent" (*id.* at 10a (emphasis in original)). Because the court concluded that the interrelatedness of petitioners' claims justified the Secretary's defense of the entire pre-1982 phase of the lawsuit, the court found it "unnecessary to determine whether the government was separately justified in its litigating position on the rental reserve fund issue" (*id.* at 8a-9a).

The court also held that the Secretary's position in the post-1981 phase of the litigation was "substantially justified." The court noted that the government had prevailed on the long-term contract issue, the principal issue involved. And it held that the Secretary had acted reasonably in litigating the question of the appropriate method of calculating petitioners' retroactive subsidy. The court viewed the competing arguments on that issue as fairly balanced, and noted that the government had prevailed on that issue in the district court. Pet. App. 12a-14a. Because the government's position throughout the litigation was thus "substantially justified," the court reversed the judgment of the district court.

DISCUSSION

Petitioners contend that this case resembles *Pierce* v. *Underwood*, cert. granted, No. 86-1512 (May 18, 1987), and *Dubose* v. *Pierce*, petition for cert. pending, No. 85-516. In fact, the only things that the cases have in common is that they are EAJA cases that arose out of HUD's operating subsidy program. The legal questions that the instant case presents are altogether different from those presented in *Underwood*, and there is accordingly no need to hold this case pending disposition of that one. Nor is there any other reason for granting certiorari here.

1. In contrast to *Underwood* and virtually all the other operating subsidy cases, the instant case was brought by project owners, rather than tenants. This case was not subject to the nationwide settlement in *Underwood*; indeed, this litigation continued long after that settlement was concluded. Most importantly, this case involves a critical issue—the unique question of whether the Secretary was required to enter into long-term operating subsidy contracts—that is not present in *Underwood* and was not present in any of the other cases. It was this critical distinction that furnished the basis for the court of appeals' decision in the case at bar, a rationale that is markedly different from the rationale of the *Underwood* decision, and that focuses upon entirely different factors.[6]

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[6] In successfully opposing petitioners' motion requesting that this Court consider the instant petition together with *Underwood*, the *Underwood* respondents pointed out that the two petitions raise entirely distinct issues. See 86-1512 Opposition of *Underwood* Respondents to Motion of Battles Farm Petitioners For Consideration of Certiorari Petition With Related Cases.

The court of appeals below thus found it "unnecessary to determine" (Pet. App. 8a-9a) the answer to the main question presented in *Underwood*—whether the Secretary was "substantially justified" in declining to pay operating subsidies out of HUD's rental reserve fund—because petitioners' meritless position on the related "long-term contract" question made the Secretary's overall defense of this lawsuit reasonable. The court of appeals accordingly did not even consider the pivotal question in *Underwood*: the significance of the *Underwood* settlement, of this Court's antecedent grant of a stay, and of this Court's grant of certiorari in a pair of related cases. See Pet. App. 8a.[7] Thus, there is no reason to hold the instant case pending the disposition of *Underwood*.[8]

2. The court of appeals' decision in this case is both narrow and correct. As the court stated, "[w]e hold only that if a private plaintiff, in its complaint, combines one adventurous far-reaching claim with a more orthodox winning claim, and the two are inter-

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[7] Petitioners do not suggest that this case involves the second question presented in *Underwood*—the nature of the factors justifying a departure from the $75-per-hour cap on EAJA fees.

[8] Petitioners' selective quotation (Pet. 12) from our certiorari petition in *Underwood* is misleading. We did not suggest there that errors in EAJA litigation intrinsically warrant review by this Court, nor did we imply that the instant case is worthy of a grant of certiorari. Rather, we asserted only that "the errors committed by the [*Underwood*] court of appeals are of considerable practical significance and warrant review by this Court." 86-1512 Pet. 8. The reasoning of the court of appeals in this case is entirely different from the reasoning of the *Underwood* court, and, as noted at pages 9-11, *infra*, is correct.

twined, we must consider the justification of the government's *entire* litigating position before awarding attorneys fees." Pet. App. 12a (emphasis in original). This holding is eminently sound, and does not conflict with the decision of any other court of appeals.

Spencer v. *NLRB*, 712 F.2d 539, 557 (D.C. Cir. 1983), cert. denied, 466 U.S. 936 (1984), and *Goldhaber* v. *Foley*, 698 F.2d 193 (3d Cir. 1983), are not to the contrary.[9] The language from those opinions on which petitioners rely (Pet. 16-18) clearly shows that the courts were referring to cases involving wholly *discrete* claims, not a case—such as the instant case—where two claims are intertwined, and failure to defend against one claim could undermine the government's position on the other. In the instant case, petitioners argued below that their two claims were intertwined, and both the district court and the court of appeals agreed. See Pet. App. 9a, 10a. This fact-bound issue does not warrant review by this Court.

Moreover, contrary to petitioners' assertion (Pet. 16-20), the court of appeals did not hold that the government's "substantially justified" position with respect to one claim mandates denial of fees where the government's position with respect to another claim is not so justified. As we have noted, the court of appeals expressly declined to decide whether the Secretary's position on the rental reserve issue,

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[9] Even if the decision below were inconsistent with *Spencer* (see statement of Judge Wald on the denial of rehearing en banc, Pet. App. 50a-52a; but see statement of Judge Silberman to the opposite effect, Pet. App. 53a-54a), that inconsistency would be for the circuit court, not this Court, to resolve. *Wisniewski* v. *United States*, 353 U.S. 901, 902 (1957).

viewed separately, was "substantially justified." Pet. App. 8a-9a. The court simply held that, where a claim the government successfully defeated was so intertwined with another claim that failure to contest the latter could jeopardize the defense of the former, the government was "substantially justified" in defending the entire case (Pet. App. 9a-11a). This is an eminently logical result.[10]

3. Petitioners' invocation of the principles set forth by this Court in *Hensley* v. *Eckerhart*, 461 U.S. 424 (1983), is also wide of the mark. Contrary to petitioners' contention (Pet. 20-24), the principles articulated in *Hensley* do not necessarily apply in EAJA litigation. The EAJA, unlike the fee-shifting statute in *Hensley* and virtually all other fee-shifting statutes, authorizes fees not to any prevailing party, but only to a prevailing party where the government's position was not "substantially justified." Indeed, it is precisely the question of substantial justification that was before the court of appeals in this case. Thus, *Hensley*, which concerned only the standards to be applied in "cases in which Congress has authorized an award of fees to a 'prevailing party' " (461 U.S. at 433 n.7), is not apposite here. Cf. *Blackmon* v. *United States*, 807 F.2d 70, 73-74 (6th Cir. 1986) (analogy to fee-shifting decision not involving United States inappropriate, because of sovereign immunity considerations); *Nichols* v. *Pierce*, 740 F.2d 1249, 1258-1259 (D.C. Cir. 1984);

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[10] Petitioners' concerns about the supposed adverse effects of the opinion below are based at most on mere speculation that the opinion will be given the broad interpretation they adopt. If that speculation is correct, there will be ample opportunity for litigants to seek review in this Court in a case directly presenting the issue.

Commissioners of Highways v. *United States*, 684 F.2d 443, 444-445 (7th Cir. 1982).

4. Petitioners finally contend (Pet. 24-27) that review by this Court is warranted because the courts of appeals allegedly apply different standards of review to district court decisions in EAJA cases. Petitioners misapprehend the degree of unanimity among the courts of appeals on this subject. Every circuit other than the Ninth Circuit that has addressed the question has held that review of a district court's decision on substantial justification is *de novo* where (as here) the only issue is whether the government's case had a reasonable basis in law. See, *e.g.*, *Vibra-Tech Engineers, Inc.* v. *United States*, 787 F.2d 1416 (10th Cir. 1986); *Russell* v. *National Mediation Board*, 775 F.2d 1284 (5th Cir. 1985); *Trident Marine Construction, Inc.* v. *District Engineer, United States Army Corps of Engineers*, 766 F.2d 974, 980 (6th Cir. 1985); *Boudin* v. *Thomas*, 732 F.2d 1107, 1117 (2d Cir. 1984); *Spencer* v. *NLRB*, 712 F.2d at 563. While *Underwood* may indicate that the Ninth Circuit adheres at least formally to an "abuse of discretion" standard (761 F.2d at 1346), and perhaps should reconsider its isolated position on this point, that circuit's inconsistent position does not necessitate review by this Court of the D.C. Circuit's correct holding in the instant case.[11] In any event, the Ninth Circuit actually appears to apply *de novo* review when only an assessment of the strength of the government's legal arguments is involved. See

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[11] Moreover, contrary to petitioners' intimation (Pet. 26), the *de novo* standard does not necessarily favor the government. It also benefits a private party who appeals from an adverse district court decision on the question of whether the government's legal arguments were substantially justified.

Foster v. *Tourtellotte*, 704 F.2d 1109, 1112-1113 (9th Cir. 1983).

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

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